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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 LANCE P. MCDERMOTT,

11 Plaintiff,

12 v.

13 PATRICK R. DONAHUE, et. al.,

14 Defendant.

CASE NO. C11-0311-MJP

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS

15 This comes before the Court on Defendants' motion to dismiss Plaintiff's claims against  
16 the United States Postal Service, Postmaster General Patrick R. Donahue, and Inspector Mitchel  
17 Vanicek and Defendants' motion to stay discovery. (Dkt. Nos. 11, 15). Having reviewed the  
18 motions (Dkt. Nos. 11, 15), the responses (Dkt. Nos. 12, 17), the reply (Dkt. No. 14) and all  
19 related filings, the Court GRANTS Defendants' motion to dismiss. Defendants' motion to stay  
20 discovery is therefore moot.

21 **Background**

22 Plaintiff Lance P. McDermott is a pro se litigant suing Defendants United States Postal  
23 Service ("USPS"), Patrick R. Donahue, the Postmaster General of USPS, and Postal Inspector  
24 Mitchel Vanicek ("Vanicek"). Plaintiff believes USPS officials violated his due process rights.

1 (Am. Compl. at 4.) When he was barred from representing a fellow USPS employee, Brenda  
2 Burke (“Burke”), in meetings with USPS, Burke was being investigated for potentially  
3 threatening statements she made when she was effectively discharged. (Id. at 6-7.) Burke is a  
4 member of the American Postal Workers Union (“APWU”) and Plaintiff is a maintenance  
5 steward. (Id., Ex. 1 at 1.)

6 Specifically, on February 8, 2011, USPS informed Burke that a committee implementing  
7 the National Reassignment Program for Limited and Light Duty Employees (“NRP”) had  
8 determined that there was no more light duty work available and discharged her to the  
9 Department of Labor’s Occupational Workers Compensation Program. (Id. at 1-2.) Burke had  
10 been given a light duty work assignment since her work-related injury two years ago. (Id. at 2.)  
11 Plaintiff was also present at the initial meeting. Upon learning she would be discharged, Plaintiff  
12 alleges Burke was “almost in tears and said – ‘I understand now what makes employees go  
13 postal.’” (Id. at 2-3.)

14 On February 11, 2011, USPS Inspectors contacted Plaintiff about Burke’s statement. (Id.  
15 at 3.) They told Plaintiff that they were conducting an administrative investigation but anything  
16 criminal in nature would be prosecuted. (Am. Compl. at 4.) Burke was also interviewed twice.  
17 (Id., Ex. 1 at 4, 8.) The night before Burke’s first interview, Plaintiff’s supervisor, Ken Dow,  
18 told Plaintiff he could not represent Burke during the interview. (Id. at 4.) But Plaintiff  
19 accompanied her to the meeting as her union steward anyway. (Id.) On the morning of the first  
20 meeting, Plaintiff alleges Vanicek would not let him represent Burke until speaking with the  
21 APWU President. (Id.) At the first meeting, Vanicek interviewed Burke and explained he would  
22 turn over his findings to management and they would make a determination regarding Burke’s  
23 threats. (Id. at 6.)

1 On March 2, 2011, the morning of Burke's second interview, Burke called Plaintiff to  
2 explain the APWU had replaced him with another steward, despite her objections. (Id. at 8.)

3 While Plaintiff initially asserted Burke's due process rights, Plaintiff submitted an  
4 amended complaint claiming his own due process rights were violated when he was barred from  
5 representing Burke. (See id., Ex. 1 at 1.)

## 6 Discussion

### 7 A. Sovereign Immunity

8 Defendants assert Plaintiff's claims against USPS and Donahue are barred by sovereign  
9 immunity. The Court agrees.

10 A suit against a government agency or officials acting in their official capacity is  
11 considered a suit against the United States. Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir.  
12 2001). The United States is immune from lawsuit unless it has unequivocally waived its  
13 immunity. Balser v. Dep't of Justice, 327 F.3d 903, 907 (9th Cir. 2003). Plaintiff bears the  
14 burden of establishing the United States consents to be sued. Cato v. United States, 70 F.3d  
15 1103, 1107 (9th Cir. 1995). Otherwise, a court lacks subject matter jurisdiction over claims  
16 against the United States. Balser, 327 F.3d at 907.

17 Here, Plaintiff has not shown the United States consents to be sued. Plaintiff refers to a  
18 variety of statutes but none waive sovereign immunity or confer subject matter jurisdiction.

19 First, Plaintiff cites the Postal Reorganization Act ("PRA") and Federal Question  
20 Jurisdiction as sources of jurisdiction. 39 U.S.C. § 409; 28 U.S.C. § 1331; (Dkt. No. 5 at 2-3.)  
21 But the PRA only allows USPS to be sued when the law provides a private right of action and  
22 does not create a private right of action itself. See Currier v. Potter, 379 F.3d 716, 725 (9th Cir.  
23 2004).

1 Second, Plaintiff cites 39 U.S.C. §1209 to confer jurisdiction over USPS. (Dkt. No. 5 at  
2 3.) This statute pertains to USPS employees' right to be involved in labor organizations. It does  
3 not create a private cause of action or confer jurisdiction over USPS.

4 Third, Plaintiff cites the Declaratory Judgment Act. 28 U.S.C. § 2201; (Dkt. No. 5 at 3.)  
5 This statute only provides an additional remedy in cases where jurisdiction is separately  
6 established. See Staacke v. U.S. Sec'y of Labor, 841 F.2d 278, 280 (9th Cir. 1988). To obtain  
7 declaratory relief in federal court, Plaintiff must have an independent basis for subject matter  
8 jurisdiction. See Stock Guaranty Nat'l Ins. Co v. Gates, 916 F.2d 508, 511 (9th Cir. 1989).

9 Fourth, Plaintiff cites the Administrative Procedure Act ("APA") to confer jurisdiction  
10 over USPS. 5 U.S.C. § 702; Dkt. No. 5 at 23. Under the PRA, the Postal Service is exempt from  
11 the APA's general mandate of judicial review over agency actions. 39 U.S.C. § 410(a); see  
12 Currier, 379 F.3d at 725.

13 Fifth, Plaintiff cites 42 U.S.C. § 1983 to confer subject matter jurisdiction over Donahue  
14 but that statute only applies to officials acting under the color of state law. Lugar v. Edmondson  
15 Oil Co., 457 U.S. 922, 931 (1982); (Dkt. 5 at 2.) Since Donahue works for a federal agency, §  
16 1983 does not confer jurisdiction over Donahue.

17 Plaintiff has not established the United States consented to suit. The Court GRANTS  
18 Defendants' motion to dismiss because Plaintiff's claims against USPS and Donahue are barred  
19 by sovereign immunity.

20 B. Qualified Immunity

21 Defendants assert Plaintiff's Bivens claims against Vanicek are barred by qualified  
22 immunity. The Court agrees.

1 Government officials are protected “from liability for civil damages insofar as their  
2 conduct does not violate clearly established statutory or constitutional rights of which a  
3 reasonable person would have known.” Pearson v. Callahan, 555 U.S. 223, ---, 129 S.Ct. 808,  
4 816 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). To determine whether  
5 qualified immunity applies, courts may use their discretion in applying one or both steps in a  
6 two-step analysis. Pearson v. Callahan, 129 S.Ct. at 818. The two steps consider whether the  
7 plaintiff alleges a violation of a constitutional right and/or whether the right was clearly  
8 established at the time of the alleged misconduct. Id. at 815-16. For a right to be clearly  
9 established the “contours of the right must be sufficiently clear that a reasonable official would  
10 understand that what he is doing violates that right.” Anderson v. Creighton, 483 U.S. 635, 640  
11 (1987).

12 Here, Plaintiff’s claims against Vanicek are barred by qualified immunity because he  
13 fails to allege a violation of any clearly established constitutional right. The only constitutional  
14 provision Plaintiff cites is the Fourteenth Amendment. (Am. Compl. at 24.) But the Fourteenth  
15 Amendment applies to state actions and Vanicek conducted an administrative inquiry under  
16 federal law. See District of Columbia v. Carter, 409 U.S. 418, 424 (1973). To the extent  
17 Plaintiff refers to his Miranda rights, Miranda rights only apply when an individual is in custody.  
18 (See Am. Compl. at 5-6.) Because Plaintiff fails to allege a clearly established right was violated  
19 his claims against Vanicek are barred by qualified immunity.

20 The Court GRANTS Defendants’ motion to dismiss because Plaintiff’s claims against  
21 Vanicek are barred by qualified immunity.

**Conclusion**

The Court GRANTS Defendants' motion to dismiss Plaintiff's claims against the Defendants on the basis of sovereign immunity and qualified immunity. Defendants' motion to stay discovery is moot.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 18th day of July, 2011.



Marsha J. Pechman  
United States District Judge